THE SCOPE OF COLLECTIVE BARGAINING

PERHAPS no issues in labor relations have engendered more controversy in recent years than those arising from the increasing attempts of employees to influence decisions traditionally within the sole discretion of management. The controversy will undoubtedly be intensified by the decision of the Supreme Court in *Fibreboard Paper Prods. Corp. v. NLRB*,[1] upholding a determination by the National Labor Relations Board[2] that an employer has a duty to negotiate with the union about decisions to subcontract work even though the decision was made for economic rather than anti-union reasons. The inclusion of subcontracting in the list of mandatory subjects of bargaining requires employers to bargain to impasse with the union before unilaterally contracting out work which could have been done by his own employees.

The Board's authority to define mandatory subjects of bargaining derives from two provisions of the National Labor Relations Act: Section 8(a)(5), which requires an employer to "bargain collectively with the representatives of his employees . . ."[3] and Section 8(d) which defines collective bargaining as the mutual obligation of union and management to "confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."[4] For many years following the passage of the NLRA the major areas of dispute between labor and management fell clearly within the definition of Section 8(d), and the question of whether a particular subject matter was within the scope of required bargaining arose with relative infrequency.[5] With the achievement of basic goals such as minimum wage standards, reasonable hours, and satisfactory working conditions, however, union efforts have naturally been directed to matters nearer the fringes of the statutory definition of "wages, hours, and other terms and conditions of employment . . . ."[6] Today, employees are likely to be as concerned with decisions about automation, plant relocation, and contracting out work, all of which affect job security, as they are with higher wages or better hours. Employers, on the other hand, wish to retain the flexibility afforded them by unilateral control over such traditionally "managerial" decisions.

Prior to recent Board decisions, management could, in general, refuse to discuss with the union economically motivated decisions to contract out work.[7]

1. 379 U.S. 203 (1964).
2. 138 N.L.R.B. 550 (1962), *enforced sub nom.* East Bay Union of Machinists v. NLRB, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964).
3. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(5) (1958).
4. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).
5. See Wellington & Summers, Labor Law: Cases and Materials (mimeograph materials on file with the Yale Law Library), p. I-251 (Preliminary Ed., no. 2, 1964).
6. *Ibid.*
7. Hays Corp., 64 N.L.R.B. 406 (1945); Mahoning Mining Co., 61 N.L.R.B. 792 (1945).

With the exception of a few aberrational cases,[8] the Board found that an employer's unilateral decision to subcontract violated Section 8(a)(5) only when the purpose was to discourage union membership or to completely avoid his obligation to bargain with the union.[9] Actually the finding of an 8(a)(5) violation was of secondary importance, since anti-union actions also violate Sections 8(a)(3) and 8(a)(1), which make it an unfair labor practice for an employer to discourage union membership or interfere with employees' rights to engage in union activities. In the absence of anti-union motivation the 8(a)(5) charges against an employer were dismissed along with the 8(a)(1) and 8(a)(3) complaints.[10] In such cases, the employer's only duty was to bargain about the *incidents* or *effects*[11] of the decision upon his employees and not about the decision itself.[12]

The major shift in Board policy regarding a nondiscriminatory, economically motivated decision to subcontract work occurred in the *Fibreboard* case.[13] Shortly before the collective bargaining agreement was to expire, Fibreboard informed the union representing its maintenance employees of its decision to subcontract out the work of its entire maintenance unit.[14] Fibreboard had determined that substantial savings could be effected by such a subcontract.[15] Although the company had been considering the feasibility of such a change

8. In Timken Roller Bearing Co., 70 N.L.R.B. 500, *reversed on other grounds*, 161 F.2d 949 (6th Cir. 1947), a complicated case involving several charges, the Board stated that Timken had violated § 8(a)(5) by refusing to bargain about subcontracting. It is unclear from the opinion, however, whether the violation arose from Timken's failure to discuss the *decision* to subcontract or merely from its failure to negotiate about the incidents or effects of that decision.

9. *Cf.* New England Web, Inc., 135 N.L.R.B. 1019, *enforcement denied*, 309 F.2d 696 (1st Cir. 1962); Rapid Bindery, Inc., 127 N.L.R.B. 212 (1960), *enforced as modified*, 293 F.2d 170 (2d Cir. 1961); W. L. Rives Co., 125 N.L.R.B. 772 (1959), *enforcement denied*, 288 F.2d 511 (5th Cir. 1961); Industrial Fabricating, Inc., 119 N.L.R.B. 162 (1957), *enforced per curiam sub nom*, NLRB v. MacKneish, 272 F.2d 184 (6th Cir. 1959); Houston Chronicle Publishing Co., 101 N.L.R.B. 1208 (1952), *enforcement denied*, 211 F.2d 848 (5th Cir. 1954).

10. See Williams Motor Co. v. NLRB, 128 F.2d 960 (8th Cir. 1942), where an employer was held to have violated § 8(a)(3) when he subcontracted the work of a department and discontinued its operation for anti-union reasons.

11. Brown Truck and Trailer Mfg. Co., 106 N.L.R.B. 999 (1953); Brown-McLaren Mfg. Co., 34 N.L.R.B. 984 (1941).

12. Although the Board at times tended to blur this distinction, the courts of appeals usually did not. See NLRB v. Adams Dairy, Inc., 137 N.L.R.B. 815 (1962), *enforced as modified*, 322 F.2d 553 (8th Cir. 1963), where the court reversed a determination by the Board that a decision on the part of Adams to terminate a phase of its business and distribute all of its products through independent contractors was a mandatory subject of bargaining. The court made it clear, however, that *after* the decision was made, § 8(a)(5) did require negotiations concerning the treatment of employees who were terminated by the decision. But see Timken Roller Bearing Co., 70 N.L.R.B. 500, *rev'd on other grounds*, 161 F.2d 949 (6th Cir. 1947).

13. 130 N.L.R.B. 1558 (1961), *rev'd on reconsideration*, 138 N.L.R.B. 550 (1962).

14. 379 U.S. 203, 206 (1964).

15. *Ibid.*

since 1954, the union had no previous knowledge of the plan.[16] The company stated that negotiation of a new contract, which the union had been seeking, would be pointless.[17] Four days later, the company terminated the employment of the maintenance workers represented by the union and replaced them with employees of Fluor Maintenance, Inc.[18]

The union filed unfair labor practice charges against the company, alleging violations of Sections 8(a)(1), 8(a)(3) and 8(a)(5). In the first of its two *Fibreboard* decisions,[19] the Board followed the previously established doctrine by dismissing all of the union's complaints on the basis of the trial examiner's finding that the company's motive in subcontracting out its maintenance work was economic rather than discriminatory. The Board rejected the contention that a management decision to cease one phase of its operations solely for economic reasons was a mandatory subject of bargaining.[20]

But the first *Fibreboard* decision was shortlived. Thirteen months later, after a change in national administrations and several changes in Board personnel, the NLRB again confronted the subcontracting problem and, in *Town and Country Mfg. Co.*,[21] reversed its first *Fibreboard* holding. In *Town and Country*, the Board found that the company's decision to subcontract its hauling operations was motivated by opposition to a newly selected union. The Board added, however, that even if the company's action had been taken solely because of economic considerations, the unilateral decision constituted an unlawful refusal to bargain.[22] To the extent that *Fibreboard* held otherwise, that case was overruled.[23] The Fifth Circuit Court of Appeals enforced the Board's *Town and Country* order, but only on the grounds that the company's determination to discharge its drivers and subcontract its work was based in part on a desire to rid itself of the union.[24] The court did not actually pass upon the question of whether the employer would have been guilty of an unfair

17. *Id.* at 207.

18. *Id.* at 206. Fluor had assured Fibreboard that maintenance costs could be cut by carefully planning the services to be performed, by reducing the work force and by decreasing fringe benefits and overtime payments. *Id.* at 207.

19. 130 N.L.R.B. 1558 (1961).

20. The Board majority reasoned that the case was not covered by the statutory requirement that an employer bargain about matters affecting conditions of employment since "[h]ere . . . no employees remained in the unit to be represented by the Union, and thus there necessarily could be no impact on the employment conditions of employees remaining in the unit." *Id.* at 1561. The actual grounds of the decision are more probably found in the Board's statement that the language of § 8(a)(5) is not ". . . so broad and all-inclusive as to warrant an inference that Congress intended to compel bargaining about basic management decisions. . . ." *Ibid.*

21. 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

22. *Id.* at 1026.

23. The Board stated that it was "now of the view that [the *Fibreboard* opinion] unduly extends the area within which an employer may curtail or eliminate entirely job opportunities for its employees without notice to them." *Id.* at 1027.

24. 316 F.2d 846 (5th Cir. 1963).

labor practice if he had unilaterally subcontracted solely for economic reasons.[25]

That question was squarely faced when the NLRB agreed to reconsider its original decision in *Fibreboard* in light of its *Town and Country* opinion. In its Supplemental Decision and Order,[26] a majority of the Board held that Fibreboard's failure to negotiate with the union concerning its decision to subcontract its maintenance work did in fact constitute a violation of Section 8(a)(5).[27] The Board ordered the company to reinstitute the maintenance operation previously performed by the employees represented by the union, to reinstate the employees to their former or substantially equivalent positions (with back pay computed from the date of the Board's supplemental decision), and to fulfill its statutory obligation to bargain.[28]

Following the D.C. Circuit's affirmance of the Board's order,[29] the Supreme Court granted certiorari on the question of whether the subcontracting work previously performed by employees in the bargaining unit is covered by the phrase "terms and conditions of employment" within the meaning of Section 8(d).[30] The Supreme Court affirmed the Board's decision, holding that the subject of the dispute was well within the literal meaning of the statutory phrase. According to the Court, inclusion of contracting out within the scope of mandatory collective bargaining would effectuate the purposes of the National Labor Relations Act by "bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace."[31]

Sound considerations support the Court's finding of a duty to bargain in this particular fact situation.[32] Essentially, the Fibreboard subcontract involved no more than the replacement of one group of employees with those of a contractor to do the same work in the same plant under the same ultimate control.[33] Any advantages that Fibreboard might receive through such a subcon-

25. Unlike the Board, the Fifth Circuit thus merely reaffirmed the established rule of finding a § 8(a)(5) violation only where anti-union motivation was present.

26. 138 N.L.R.B. 550 (1962).

27. Member Rodgers dissented vigorously, stating that

> If this ruling of the majority stands, it is difficult to foresee any economic action which management will be free to take of its own volition and in its own vital interest (whether it be the discontinuance of an unprofitable line, the closing of an unnecessary facility, or the abandonment of an outmoded procedure) which would not be the subject of *mandatory* bargaining.

Id. at 559-60. (Emphasis in original.)

28. *Id.* at 554-55.

29. *Enforced sub nom.* East Bay Union of Machinists v. NLRB, 322 F.2d 411 (D.C. Cir. 1963).

30. 375 U.S. 963 (1964). The Court also granted certiorari on the question of whether or not the Board had exceeded its power in requiring back pay. The Board's remedy was upheld.

31. 379 U.S. 203, at 211.

32. See text at footnote 47, *infra.*

33. 379 U.S. 203, at 213.

tract would be the result of economies achieved from a reduction of the work force, decreased fringe benefits, or lower wages.[34] The subcontract enabled Fibreboard to avoid its statutory obligation to discuss such matters with the representatives of his employees. An employee's right to have a voice in the determination of wages and benefits is reduced to naught if the employer may then unilaterally replace his workers with others who do the same work for different compensation. The decision, furthermore, does not impose an undue burden upon management.[35] *Fibreboard* does not require that the employer accede to union objections to his proposal to subcontract; the decision requires only that he notify the union of his intention to subcontract and that he discuss with them the questions of wages, hours, and benefits — all traditional subjects of collective bargaining — which are generally the crucial considerations in subcontracting decisions. If the union is unable to offer a viable economic alternative to subcontracting, the employer is then free to proceed with his plan.[36]

Although correct as applied to the facts, the rationale and the language of the majority opinion are much too broad. While the grounds of the decision are somewhat unclear, the Court appears to rest its holding upon the assertion that the subject matter of the dispute fell within the literal meaning of the phrase "terms and conditions of employment."[37] Two arguments were used to buttress this claim. First the Court noted that a stipulation in a collective bargaining agreement regarding subcontracting might appropriately be called a condition of employment.[38] This bald statement, however, is a truism that would apply with equal force to any stipulation which a party insisted upon as a precondition to entering into an employment agreement. Greater reliance was placed upon a second argument which may best be characterized as an "impact" or "result" test: since the subcontract resulted in termination of employment, the decision to subcontract clearly "affected conditions of employment."[39] Such a test implies that every management decision which either results in terminations or has some other impact upon employees should be subject to mandatory bargaining.[40] Nearly all management decisions, however, affect employees in some manner. Decisions involving sales programs, financ-

34. *Id.* at 206.

35. See, *contra* the dissenting view of Member Rodgers of the NLRB, note 27 *supra*.

36. 379 U.S. 203, at 214.

37. *Id.* at 210. In addition, the Court stated that its conclusion was "reinforced by industrial practices." The evidence it cited, however, is not especially persuasive. The Court referred to a study showing that 378 of 1687 collective bargaining agreements analyzed "contained some form of limitation on subcontracting." *Id.* at 212 n.7.

38. *Id.* at 210.

39. The words ["conditions of employment"] even more plainly cover termination of employment which, as the facts of this case indicate, necessarily *results* from the contracting out of work performed by members of the established bargaining unit. *Ibid.*

40. Mr. Justice Stewart sees this implication in the majority's language and rejects it. 379 U.S. 203, at 218.

ing, and general efficiency of business operation ultimately may have as great an impact on job security as seniority rights. A poorly run company will support fewer jobs than a well run company. Under the majority's impact theory the collective bargaining process could subsume nearly all of the decisions that now constitute the basis of entrepreneurial control.

The failure of the majority to offer a satisfactory cutting principle undoubtedly prompted the criticism by Mr. Justice Stewart, in a concurring opinion joined in by Justices Harlan and Douglas, that the Court's opinion "radiated . . . implications of disturbing breadth."[41] The three concurring justices emphatically rejected the idea that every management decision which terminates an individual's employment is necessarily subject to mandatory bargaining.[42] In their view, the purpose of Section 8(d) is to describe a limited area subject to the duty to bargain.[43] The concurring justices would exclude from that area those management decisions "which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security. . . ."[44] They concurred in the result on the narrow grounds that *Fibreboard* was analytically similar to a case in which an employer avoided his duty to bargain about wages by discharging his employees and replacing them with others who were willing to work for less.[45] The concurring opinion — in contrast to the too sweeping majority opinion — rests upon an unduly limited principle. For example, the concurring justices would exclude from mandatory bargaining the replacement of employees by automation.[46] And yet the factors underlying a decision to automate and its amenability to management-union discussion are strikingly similar to the subcontracting problem of *Fibreboard.*

Somewhere between the Scylla of the majority's sweeping generalities and the Charybdis of the concurrer's unduly restricted rationale lies a proper test. Instead of considering merely the results of a decision, *i.e.,* its potential impact upon employees, the Board and the courts should seek to isolate and examine the factors which underlie a given decision. When considerations which bear an intimate relation to employees (such as labor costs) are crucial to an employer's decision, or when such considerations would be relevant to collective bargaining about a decision, a duty to bargain should be imposed. This approach would compel management to negotiate not only with respect to the type of subcontracting decision involved in *Fibreboard,* but would also require

41. *Id.* at 217.
42. *Id.* at 218.
43. *Id.* at 223.
44. *Ibid.*
45. *Ibid.*
46. Justice Stewart stated that

> an enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control.

Id. at 223.

negotiations with regard to such decisions as the replacement of labor by automation. In both cases, such considerations as wages, hours and work scheduling are critical to the decision ultimately undertaken by the enterprise. On the other hand, under a "relevancy" test, bargaining would not be compelled with regard to such strictly managerial concerns as financing and sales promotion since wages and hours are not usually central to these decisions.

The relevance test will not yield the same results for the same decision in every case. For example, an employer's decisions to terminate portions of his operation might be subject to mandatory bargaining in some situations, but not in others. One possible case might involve a decision by a manufacturer of various products to cease production of a particular item because of a drastic drop in demand for that product. Under the test proposed above, such a decision would not be subject to mandatory bargaining since it was compelled by considerations unrelated to labor issues. But when management decides to close one of several departments or plants because of cost inefficiencies, bargaining should be imposed since labor costs and related matters would be crucial factors.[47] Of course, in practice it may not be clear which factors underlie a particular decision. Consequently, bargaining should be required where it is possible that labor costs or related matters are involved. If the decision is in fact based upon external circumstances which could not be changed by union proposals, impasse will quickly be reached.

Because the relevance test can distinguish between decisions which relate to labor matters and those which do not, the test purposefully effectuates the aims of the statute. Although the Act seeks to obtain for employees a voice in the determination of matters that are ultimately related to their employment, it does not provide for the submission to joint control of *all* the decisions and acts of an enterprise.[48] The approach outlined above seems best calculated to distinguish meaningfully between those traditionally managerial decisions which should be excluded from mandatory bargaining and those which may more appropriately be subjected to joint determination.

A finding that management's action is the *kind* of decision covered by *Fibre-*

47. In Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965) the Supreme Court held that a single businessman could go out of business for any reason — including anti-union motivation — without violating either § 8(a)(1) or § 8(a)(3). The Court also noted that no argument is made that § 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise. *Id.* at 267 n.5.

The Court went on to say, however, that a *partial* closing is an unfair labor practice under § 8(a)(3) if motivated by an intention to discourage unionism, *Id.* at 275. The Court did not pass upon the question of whether an employer is under a duty to bargain about a partial closing which is motivated by economic considerations.

48. For decisions by courts of appeals excluding various management decisions from the scope of the duty to bargain, see NLRB v. Adams Dairy, 322 F.2d 553 (8th Cir. 1963); NLRB v. New England Web, Inc., 309 F.2d 696 (1st Cir. 1962); NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960); Mount Hope Finishing Co. v. NLRB, 211 F.2d 365 (4th Cir. 1954).

board does not mean that management must negotiate about the decision in all situations. Sometimes forcing negotiations will be extremely burdensome to the company. This danger is especially accute in subcontracting cases because the need for subcontracting a particular operation will often be unforeseen at the time of the collective bargaining agreement. Requiring negotiations in the middle of the contract period might be a great inconvenience. Also, a large corporation may negotiate numerous subcontracts. The Westinghouse Electric Corporation, for example, subcontracted more than 5,000 pieces of work in a single year.[49] Requiring negotiations here would be even more burdensome. The Board has recognized management's legitimate objections in cases like these, and in a series of post-*Fibreboard* decisions [50] has indicated that management might be excused from bargaining during the contract period when the following factors existed:

(1) the collective bargaining agreement included either a "management functions" clause, or a provision that could be construed as an indication of the parties' intention to allow unilateral subcontracting by management;[51]

(2) the subcontracting involved comported with the traditional methods by which the employer conducted his business and did not vary in degree or kind from subcontracting other work under the company's established practice;[52]

(3) the union had an opportunity to bargain about changes in exist-

49. Westinghouse Electric Corp., 150 N.L.R.B. No. 136, 58 L.R.R.M. 1257 (1965).

50. Shell Oil Co., 149 N.L.R.B. No. 22, 57 L.R.R.M. 1271 (1964); General Motors Corp., 149 N.L.R.B. No. 40, 57 L.R.R.M. 1277 (1964); Kennecott Copper Corp., 148 N.L.R.B. No. 169, 57 L.R.R.M. 1217 (1964); Shell Oil Co., 149 N.L.R.B. No. 26, 57 L.R.R.M. 1279 (1964); Georgia-Pacific Corp., 150 N.L.R.B. No. 88, 58 L.R.R.M. 1135 (1965); Ador Corp., 150 N.L.R.B. No. 161, 58 L.R.R.M. 1280 (1965); Westinghouse Electric Corp., 150 N.L.R.B. No. 136, 58 L.R.R.M. 1257 (1965); Superior Coach Corp., 151 N.L.R.B. No. 24, 58 L.R.R.M. 1369 (1965); Fafnir Bearing Co., 151 N.L.R.B. No. 40, 58 L.R.R.M. 1397 (1965); American Oil Co., 151 N.L.R.B. No. 45, 58 L.R.R.M. 1412 (1965). But *cf.* Standard Handkerchief Co., 151 N.L.R.B. No. 2, 58 L.R.R.M. 1339 (1965).

51. General Motors Corp., 57 L.R.R.M. 1277, at 1278 (clause in national agreement reserving to management the "exclusive responsibility" for actions and decisions concerning the "methods and means" of operation); Shell Oil Co., 57 L.R.R.M. 1271, at 1273 (clause in collective bargaining agreement providing equal pay for employees to whom work is subcontracted read as granting to management right to subcontract unilaterally); Kennecott Copper Corp., 57 L.R.R.M. 1217 (management rights clause); Ador Corp., 58 L.R.R.M. 1280 (management rights clause giving employer exclusive right to eliminate production of any of his products and to lay-off employees no longer needed). See especially Fafnir Bearing Co., 58 L.R.R.M. 1397, where the Board states that the trial examiner gave insufficient weight to the presence of a management functions clause. Contrast the ever but slender regard the Supreme Court gave to a management rights clause in an arbitration context in United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, at 583-89 (1960).

52. In Westinghouse Electric Corp., 58 L.R.R.M. 1257, 1258 the employer was found not to have violated § 8(a)(5) by failing to consult the union about each of thousands of annual subcontracting decisions involving bargaining unit work, since the company, as the union knew, had engaged in such subcontracting practices since the early 1940's.

ing subcontracting practices at the general negotiating sessions with the company;[53]

(4) the subcontract involved had no demonstrable adverse effect on employees in the bargaining unit;[54]

(5) the exigencies of the particular business decision involved required unilateral action.[55]

Taken together, these factors establish a framework within which the Board has reasonably restricted an employer's duty to bargain about subcontracts let during the term of a collective bargaining agreement. It is not necessary that all of these factors be present in a given case. On the other hand, neither is any one factor dispositive. What is necessary (for an employer to be excused from bargaining about a particular decision) is a showing that the union had sufficient notice of the company's subcontracting plans and practices so that the union could have raised objections during the preceding contract negotiations.[56] If the labor-management contract contains a "management rights" clause, for example, the union may be deemed to have waived any objection it might have to subcontracts let during the term of the agreement. This waiver is effective at least when the subcontracts do not have a harsh and unexpected impact upon employees in the bargaining unit. Even when the collective bargaining agreement contains no clause which either directly or indirectly grants unilateral subcontracting power to management, the company will still be free to continue *established* subcontracting practices. Here the workers are put on constructive notice of the company's operation. Certainly the union could have requested to bargain about subcontracting policy during the contract negotiations. The basic concept underlying these decisions seems to be that when the union has been given notice of the employer's subcontracting practice, a unilateral subcontract will not disadvantage the union inordinately — at least in comparison with the hardship that would beset management if bargaining to impasse were required for each separate decision.

The Board's post-*Fibreboard* cases heed management's cry of inconvenience. But they do not take from the union what it gained in *Fibreboard*. Under *Fibreboard*, the union must be notified in advance of a proposed subcontract.

53. This assumes that the subcontracting practices were established policy of the company so that the union was on notice as to their existence at the time of negotiation of the collective bargaining agreement. *Ibid.*

54. Kennecott Copper Corp., 57 L.R.R.M. 1217; Shell Oil Co., 57 L.R.R.M. 1279. In Superior Coach Corp., 58 L.R.R.M. 1369, and Fafnir Bearing Co., 58 L.R.R.M. 1397, the Board indicated that the fact that no lay-offs, terminations, or reduction in working hours occur as a result of the subcontract will be taken as evidence that the action was not of significant detriment to the employees in the unit.

55. In Shell Oil Co., the Board stated that

> [T]he amount of time and discussion required to satisfy the statutory obligation "to meet at reasonable times and confer in good faith" may vary with the character of the subcontracting, the impact on employees, and the exigencies of the particular business situation involved.

57 L.R.R.M. 1279, at 1280.

56. Westinghouse Electric Corp., 57 L.R.R.M. 1257, at 1258.

Previously, a union's bargaining position was frequently undermined by the fact that a subcontracting decision was presented to it as a *fait acompli.* When the subcontracting occurred in a context of surprise the union was prevented from negotiating effectively for alternative solutions.[57] It is possible that in some instances the union will be able to convince the employer that it would be more economcial to keep the work within the plant.[58] When management has carefully studied the problem and has found that substantial savings can be achieved through subcontracting, however, it is doubtful that the union can make a better offer. Even in this situation the union may still use its bargaining position to seek a more favorable termination settlement. For example, a union might be willing to agree to a subcontracting proposal that would terminate bargaining unit work in exchange for a promise that terminated members would be given preferential hiring rights in other areas of the employer's operations. *Fibreboard* also makes it easier for a union to prove an 8(a)(1) or 8(a)(3) charge. Although an employer was previously prohibited from subcontracting for anti-union reasons,[59] the charge was often difficult to prove.[60] Now, in discussing his decision to subcontract, the employer will be required to present evidence showing the economic reasons for the change.[61] The requirement of prior bargaining will clarify the actual bases of the decision. When an employer is unable to present evidence of economic benefit, the union will have a stronger case. Thus the Board's post-*Fibreboard* cases accommodate both the union's interest in bargaining and the employer's interest in flexibility.

57. See Standard Handkerchief Co., 151 N.L.R.B. No. 2, 58 L.R.R.M. 1339 (1965); Shell Oil Co., 149 N.L.R.B. No. 22, 57 L.R.R.M. 1271 (1964).

58. The *Fibreboard* majority thought it possible that the union could propose a mutually acceptable plan in that case. 379 U.S. 203, at 214.

59. See text at note 9 *supra.*

60. The courts have frequently overturned Board findings of anti-union motivation in duty to bargain cases. See, *e.g.,* NLRB v. Houston Chronicle Publishing Co., 211 F.2d 848 (5th Cir. 1954), *denying enforcement of,* 101 N.L.R.B. 1208 (1952); NLRB v. W. L. Rives Co., 288 F.2d 511 (5th Cir. 1961), *denying enforcement of,* 125 N.L.R.B. 772 (1959); NLRB v. New England Web, Inc., 309 F.2d 696 (1st Cir. 1962).

61. See, *e.g.,* NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956), in which the Supreme Court held that an employer who refused to substantiate a claim of economic inability to raise wages had not fulfilled his obligation to bargain in good faith.